

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 16-11700-smb

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5 In the Matter of:

6
7 GAWKER MEDIA, LLC,

8 Debtor.

9 - - - - - x

10
11 U.S. Bankruptcy Court

12 One Bowling Green

13 New York, NY 10004

14
15 April 25, 2017

16 10:01 AM

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21 B E F O R E :

22 HON STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

24
25 ECRO: KAREN

Hearing re: Application for FRBP 2004 Examination Motion of
the Debtors for Leave Pursuant to Rule 2004 of the Federal
Rules of Bankruptcy Procedure to Conduct Discovery
Concerning Potential Plan Issues and Potential Causes of
Action, and to Establish Discovery Response and Dispute
Procedures

Transcribed by: Sonya Ledanski Hyde

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1 P R O C E E D I N G S

2 THE COURT: Gawker?

3 MR. GALARDI: Good morning, Your Honor. For the
4 record, Gregg Galardi, Ropes & Gray, on behalf of the Gawker
5 Debtor, which is now post-effective date, so on behalf of
6 the plan administrator. This is the Debtor's motion that
7 has been adjourned a number of times with respect to a 2004
8 exam. And if I may just proceed on that motion?

9 THE COURT: Go ahead.

10 MR. GALARDI: Your Honor, the motion was filed for
11 three purposes back on October 11th: the first was to
12 investigate various activity with the creditors and the
13 potential to designate votes; tips to help to formulate a
14 plan; and then third, for the purpose of investigating the
15 potential prima facie tort with respect to Mr. Thiel.

16 Your Honor, the objectors make much about the
17 motion not serving its purposes, but I think the chronology
18 and facts actually undermine those arguments. It was filed
19 on October 11th; settlements were reached on October -- the
20 end of October; settlements got put into a plan. All of the
21 settlements addressed the 2004 exam, and all of those
22 settlements held them in abeyance until after confirmation.

23 So the third purpose is the only purpose in which
24 we are prosecuting today, with respect to getting
25 information, with respect to the cause of prima facie tort.

1 We have sought this because we would like to get more
2 information before filing the Complaint if a Complaint is
3 ever filed. That was the status as of the objective date,
4 and it's also the basis for why there have been a number of
5 adjournments.

6 So let me just turn to the prima elements of the
7 prima facie tort and what we think we need and why we think
8 this is an appropriate 2004 exam. There are, as everybody I
9 think agrees in the Court, four elements to the prima facie
10 tort: first, an intentional infliction of harm; two, that
11 harm has to be without justification and motivated solely by
12 malice; three, special damages; and four, it can be an act
13 that is otherwise lawful.

14 THE COURT: What's the definition of malice?

15 MR. GALARDI: That would meaning -- I'm not sure
16 of the specific, but it has to be solely the intention to
17 harm or to destroy or otherwise to inflict injury on the
18 party.

19 So, obviously -- well, not obviously -- the first
20 element. We do not dispute that there is anything unlawful
21 about financing litigation. We do not dispute that Mr.
22 Bollea could have his day in the Court, but that is not a
23 counter -- that is not a defense to the prima facie tort.

24 Second -- so one element is satisfied -- special
25 damages. Your Honor has heard from the beginning of this

1 case through the auction regarding potential loss of
2 business value, both prefiling and after filing, and,
3 indeed, we have reserve rights with respect to the auction
4 itself. And Your Honor is familiar with the fact that as a
5 result of some of this litigation, we had to carver out
6 gawker.com from the sale. So we think we can allege special
7 damages.

8 As to the intentional infliction of harm, I don't
9 think there's really a dispute that Mr. Thiel acted
10 intentionally. He funded litigation admittedly. He
11 authorized the search for plaintiffs.

12 THE COURT: Can I ask you what more facts you need
13 to frame a Complaint?

14 MR. GALARDI: Your Honor, I guess the real facts
15 and discovery would be with respect to the final element of
16 whether or no his motive was pretense. What we have is a
17 series of articles, which is really the fourth on. Is it
18 motivated solely by malice, as opposed to other motivations?
19 We have statements that we think can construe as malice, but
20 there are also other statements, which we readily admit are
21 out there. He has made comments about, it's not a financial
22 fight, it's my greatest philanthropic thing I've done.

23 THE COURT: Okay, so you have a good faith dispute
24 on that element. Normally, you would allege that in the
25 Complaint and then take discovery. Why is this different?

1 MR. GALARDI: Your Honor, it's different in the
2 sense that before -- and, again, from the plan administrator
3 standpoint, the whole point of 2004 is to see if there are
4 other -- it's an ambiguous, and we're going to be asked to
5 take on a litigation, potentially spending estate assets.

6 THE COURT: Yeah, but the estate assets really
7 belong to equity at this point. All the creditors have been
8 paid in full.

9 MR. GALARDI: Well, but that doesn't belittle the
10 fact that you still have to have a fiduciary obligation to
11 those stakeholders to determine to spend those monies to
12 potentially investigation, and, again, we have investigated.
13 We have gone out prefiling with respect to contingency fee
14 lawyers. And with respect to that to minimize the cost to
15 the estate, we would like to have additional facts to
16 determine whether people are prepared, on a contingency
17 basis, to take on this litigation.

18 The 2004 exam is exactly to that fact, and whether
19 we simply go on the public statements, which the press have
20 made on interviews, versus finding whether there are primary
21 sources directly from Mr. Thiel himself as to his
22 motivation.

23 THE COURT: Can I ask you a different question.
24 To what extent do the settlements limit what you can inquire
25 into?

1 MR. GALARDI: Well, Your Honor, the settlements
2 clearly provide that we cannot ask for the documents about
3 the Bollea or the Bollea settlement. They also clearly
4 limit that we cannot ask about documents, other than one
5 separate class, with respect to Ayyadurai and Terrill. We
6 are clearly limited by that.

7 THE COURT: So what's left?

8 MR. GALARDI: Well, we submitted Mr. Wong's
9 documents. Mr. Wong has -- what -- has not --

10 THE COURT: I've seen those.

11 MR. GALARDI: Okay? There are allegations with
12 respect to solicitation of plaintiffs' actions. We have
13 been advised in conversations and wanted to explore that
14 many other plaintiffs were approached about potentially
15 financing the litigation, and we don't have that
16 information. We also have information that it was four or
17 five years in the making, when eventually it came out that
18 he was financing the Bollea litigation. So we think simple
19 emails can say -- I mean, I doubt we have an email of this
20 sort -- but if Mr. Thiel writes to his friend, I am going to
21 put Gawker out of business at all costs, I do not care.

22 THE COURT: You hope to find that, right?

23 MR. GALARDI: I hope to find that email, exactly.
24 But, look, it's (indiscernible), I know them very well. I'm
25 sure he doesn't have that email. But we would like to see

1 whether those emails to make sure that we can do the proper
2 cost benefit analysis with respect to pursuing the
3 litigation.

4 Your Honor, and I also do want to add, okay. We
5 also have an obligation, and I think this is important, as
6 Your Honor has -- as has been pointed by Mr. Bollea's
7 counsel, there was a cooperation agreement. And that
8 cooperation agreement required that we negotiate in good
9 faith with respect to settlements, including the Daulerio
10 settlement, the Denton settlement. Both of those were
11 accomplished.

12 We did get a settlement agreement. It was not
13 cast in stone, as they will readily admit. The issue was
14 whether there was adequate consideration for us to give a
15 release to Mr. Thiel in that document.

16 Given the facts, given what Your Honor has
17 noticed, clearly, we could sign a Complaint. The question
18 is whether we're going to pursue those assets. We ask for
19 simple documents to, in fact, provide us to either confirm
20 that we can give that release -- again, Mr. Clark probably
21 will.

22 THE COURT: But that's a different issue. You're
23 not seeking documents now to decide whether or not you're
24 going to give the release.

25 MR. GALARDI: Well, again, they go both ways, Your

1 Honor. If we don't find documents to justify, we can either
2 withdraw or we can negotiate a release. I do think the
3 documents are critical to either. It's confirmatory to do
4 it.

5 THE COURT: So why don't you just sue him like
6 everybody else would do and get your discovery, and then
7 determine whether or not to settle?

8 MR. GALARDI: Your Honor, if you don't grant the
9 2004, that may be the position we're in, and we'll see if a
10 law firm is prepared to do that.

11 THE COURT: You're not suggesting that this Court
12 would have jurisdiction?

13 MR. GALARDI: No, I'm not suggesting that this
14 Court would have jurisdiction.

15 THE COURT: So you want information about a
16 litigation over which this Court doesn't have jurisdiction.

17 MR. GALARDI: I think that's correct, Your Honor,
18 but I don't think that's a limitation on 2004 because it's
19 an estate cause of action. And I still believe that just
20 because Your Honor doesn't have the jurisdiction to enter
21 final findings, it is still an asset of the estate that Your
22 Honor has jurisdiction over.

23 I don't know if Your Honor has any other
24 questions.

25 THE COURT: No.

1 MR. GALARDI: Thank you.

2 THE COURT: Thank you.

3 MR. TABAK: Good morning, Your Honor. Dan Tabak
4 from Cohen & Gresser, on behalf of Mr. Bollea.

5 THE COURT: What's your interest in this? Since
6 he can't get any discovery about your case, why are you
7 involved in this?

8 MR. TABAK: We're involved in this because we have
9 a settlement agreement. And under that settlement
10 agreement, first, we wanted -- Mr. Bollea wants to move
11 forward. The longer that this is in the public's sphere,
12 the more difficult it is for him to move forward with his
13 other --

14 THE COURT: Why? I don't understand that.

15 MR. TABAK: For example, Mr. Bollea was
16 interviewed on Good Morning America. He's tried to promote
17 a new store that he opened at Hogan's Beach in Orlando. And
18 the questions that Good Morning America puts on -- airs are
19 mostly about the lawsuit. Mr. Bollea wants to advertise his
20 store, not the lawsuit. That's why this was -- actually,
21 the full third day of our settlement negotiations were about
22 these provisions. And it was to have these mutual
23 provisions where Mr. Bollea agrees to give up, not just
24 theoretical hypothetical claims against Mr. Denton and Mr.
25 Daulerio, he gives us judgments in hand. And in return, the

1 debtors were supposed to give up --

2 THE COURT: Sure, he gets \$31 million, right?

3 MR. TABAK: That's part of it.

4 THE COURT: Plus, plus there's something at the
5 end possibly.

6 MR. TABAK: That's right, 45 percent of this
7 lawsuit, which he doesn't think the debtors should bring or
8 the plan administrator.

9 THE COURT: No, but that's not his call.

10 MR. TABAK: That's right.

11 THE COURT: In other words, your deal provides
12 that if the debtor brings this lawsuit and recovers, he gets
13 45 percent of it?

14 MR. TABAK: That's ultimately --

15 THE COURT: You should be all for this application
16 then.

17 MR. TABAK: Mr. Bollea is not because he thinks
18 that the application, it's not fair, it's not meritorious.
19 And it's going to do exactly what he's tried to avoid -- get
20 this lawsuit out of the top paragraph of every story about
21 him. He wants the stories about him to be about his
22 outstanding wrestling career, to be about the stores that
23 he's opening, to be about other things. That's why he
24 bargained specifically for this provision, and it's a
25 parallel provision to the Denton and Daulerio provisions.

1 And it's interesting, nowhere in Gawker's reply
2 papers do they address the language in the provision,
3 because there is no reading of the provision that says they
4 get to cooperate and work in good faith to secure releases,
5 but first, they get to take some discovery to see whether
6 they have claims.

7 THE COURT: Well, there's no release. Now I think
8 the only issue is whether or not a debtor in this particular
9 situation -- post-confirmation, no benefit to creditors, et
10 cetera, et cetera -- is entitled to take 2004 discovery
11 about a possible claim.

12 MR. TABAK: I would say so, Your Honor, except
13 that this settlement agreement is part of the plan. It
14 needs to be enforced as part of the plan. Mr. Bollea lived
15 up to his obligations.

16 THE COURT: But the Ayyadurai and Terrill
17 settlements clearly allow him to get some discovery about
18 this. That's also part of the plan.

19 MR. TABAK: That's right, and he can get that
20 discovery. But the way this was set up was, if Mr. Denton
21 or Mr. Daulerio were not interested in mutual general
22 releases, then we wouldn't have to negotiate them. Mr.
23 Denton was; Mr. Daulerio, we dragged kicking and screaming.
24 Wait till you see his bill for this.

25 THE COURT: You know, I have to tell you, Mr.

1 Tabak. He can't get any discovery about your client from
2 Harder or anybody else, and I just don't know what you're
3 protesting. He may bring the action anyway, and, you know,
4 he has the right to do that presumably.

5 MR. TABAK: First, we think on the settlement
6 agreement, he doesn't have the right any longer. He has to
7 work in good faith to get the releases from Mr. Thiel. Mr.
8 Thiel's offered not just to --

9 THE COURT: So then he's saying the dis -- if you
10 want get back into that, he's saying he needs the discovery
11 in order to determine what the value of the claim is.

12 MR. TABAK: But that was something that he decided
13 in October. That was part of our agreement in October. For
14 instance, he knew -- when we reached a settlement in
15 October, he knew that he had a very heavy burden to lift.
16 He knew that according to Gawker's own papers, they
17 essentially could not meet Rule 11 at that time.

18 They did not understand whether they had a claim.
19 And he still gave up the discovery about Mr. Bollea, gave up
20 almost all discovery about Terrill and Ayyadurai. And he
21 agreed that if Mr. Thiel was willing to give a mutual
22 general release, that Gawker would meet and do the same
23 thing. And that was a key and integral part, it was a full
24 day of negotiations.

25 THE COURT: If you're telling me, or Thiel is

1 telling me since he's the party in interest, that the debtor
2 breached an agreement that was for his benefit, he can bring
3 a breach of contract action. But I don't see how that has
4 anything to do with the 2004 application. Why don't you
5 wrap up.

6 MR. TABAK: The other issue on the discovery is,
7 Your Honor, I agree with you that there shouldn't be any
8 discovery about Bollea. That's the clear language, no
9 discovery.

10 THE COURT: He's agreeing with this.

11 MR. TABAK: He's not. His papers say that he
12 wants to ask Thiel why Thiel was funding the Bollea
13 litigation.

14 THE COURT: Well, as I read the Bollea settlement,
15 he can't ask any questions or get any discovery relating to
16 the financing of the Bollea lawsuit.

17 MR. TABAK: Including litigation. That's the way
18 I read it.

19 THE COURT: All right.

20 MR. TABAK: That's not what their papers say that
21 they plan to do.

22 THE COURT: Well, so he's asking for the sun, the
23 moon, and the stars and he's not going to get it, but he
24 still may get the sun.

25 MR. TABAK: What Mr. Bollea's concern is that

1 we're going to be spending a lot of time in this Court, and
2 I'm going to be spending a lot of time at depositions
3 arguing over what's the difference between the sun, the
4 moon, and the stars, and that the sun is a star.

5 THE COURT: That's the overall deal that's struck.
6 For example, there's nothing that prevents the debtor from
7 inquiring to Mr. (indiscernible) or other possible entities
8 or persons out there who Mr. Thiel decided to finance, and
9 that's the deal.

10 MR. TABAK: We understand that. We want to make
11 clear that what the debtors are saying in their papers that
12 they can ask Mr. Thiel about why he financed the Bollea
13 litigation, as Your Honor said, that that's not permitted.
14 But we also believe Mr. Bollea lived up to his obligations.
15 He gave up real claims and judgment, not theoretical claims,
16 in a parallel provision, that the debtors are now saying
17 they get to take discovery to see if there's anything else.

18 THE COURT: I really -- I don't understand your
19 argument. Thanks. Mr. Clark, am I going to hear you oppose
20 a 2004 application today?

21 MR. CLARK: Your Honor, it is --

22 THE COURT: And I will remember everything you
23 say.

24 MR. CLARK: This is becoming a subspecialty for
25 me. I can argue either side or all sides.

1 THE COURT: It's like the old story about Abraham
2 Lincoln and the Illinois Supreme Court. They said, how can
3 you argue two different sides on two different days; and he
4 said, I got to be right once.

5 MR. CLARK: Me and a broken watch, we're right
6 twice a day, Your Honor.

7 THE COURT: I'll give you once, go ahead.

8 MR. CLARK: Good morning, Your Honor. Tony Clark
9 and my colleague, Shana Elberg and Rob Weber for objector,
10 Peter Thiel.

11 Your Honor, I'm going to focus, based on your
12 comments, on what I call the no-fish issue here. Under Rule
13 2004, historically, it had been described as a legitimate
14 fishing expedition. Now, Gawker's reply recognizes -- and
15 Your Honor's most recent decision, I think in Sun Edison,
16 recognizes -- that's no longer the case. Proportionality is
17 required for a 2004 examination.

18 But even under that broader outdated standard,
19 there at least had to be a fish to be found from the
20 discovery that was being requested. And, here, there is no
21 fish. The only rationale that they're offering now --
22 they've abandoned the plan and the voting pretext for the
23 discovery. Their only justification now is that the debtors
24 may have a prima facie tort case claim against Mr. Thiel,
25 and it just needs to figure that out from what Mr. Galardi

1 calls a simple document request. But when you look at it on
2 its face, it's a virtually unlimited document proctology
3 examination he wants to take from Mr. Thiel and Mr.
4 (indiscernible).

5 THE COURT: It's not the best analogy, you know.

6 MR. CLARK: I got better analogies coming, Your
7 Honor. And he wants all of that discovery before Gawker's
8 professionals, who seem to have drunk the Gawker prior
9 management's Kool-Aid on the Bollea litigation,
10 notwithstanding that damning final judgment in Florida,
11 before they'd be satisfied.

12 And the fights -- and Mr. Tabak referred to this -
13 - the fights that are going to follow between Gawker on the
14 one hand and Mr. Thiel, Mr. Harder, and other targets of the
15 discovery of the bounds of the discovery, infinite privilege
16 issues, no double countless --

17 THE COURT: Well, Gawker didn't represent Thiel,
18 so I don't know what the privilege issue is there, and
19 that's what he's most interested in.

20 MR. CLARK: Well, they're going to talk to Mr.
21 Harder about everything to do with Mr. Bollea and Mr. Thiel.

22 THE COURT: Well, they can't do that.

23 MR. CLARK: I agree they can't do that, but that's
24 what they say they want to do.

25 THE COURT: Do you agree that you can't do that?

1 MR. GALARDI: We agree that we can't do it, and
2 they all are forgetting the papers were filed on the 11th,
3 and we explained this to them in Florida.

4 THE COURT: Right. Okay, so we've made some
5 progress today.

6 MR. CLARK: In any event, those fights, I think --
7 Your Honor, I'm going to be a crystal ball reader -- are
8 going to be clogging up the docket in this Court for some
9 time to come, but the real question is to what end. Whether
10 you look at this under Florida law that we say controls --
11 Florida law which doesn't even recognize prima facie tort --
12 or under New York law.

13 THE COURT: Can I ask you a question?

14 MR. CLARK: Yes, sir.

15 THE COURT: And I've read a lot about what the
16 elements of the cause of action are and whether they can
17 prove it. Do I really have to decide whether or not a
18 hypothetical Complaint, which they may or may not ever file,
19 will survive a motion to dismiss in order to determine
20 whether there's cause to give the discovery so they know
21 whether they can file a Complaint in the first instance.

22 MR. CLARK: No, I don't think it's a 12(b)
23 standard, Judge. But I do think that there has to -- they
24 have to -- they have the burden of establishing good cause
25 for the examination. And to do that, they've got to at

1 least show on the face of things that there's, if not a
2 claim that'll survive Rule 12(b)(6), at least something
3 that's substantially colorable.

4 THE COURT: Well, you know that Mr. Thiel financed
5 the Bollea litigation.

6 MR. CLARK: That is correct.

7 THE COURT: And the only issue seems to be what
8 his motive was, whether it was malice or something else.

9 MR. CLARK: Two issues: I think that's the one
10 that's gotten the most attention, and that is clearly an
11 issue; the second issue, though, is whether, as to any
12 hypothetical theoretical speculative claim against Mr.
13 Thiel, there is any suggestion in the record of special
14 damages. And the only damages here come from the Bollea
15 case, tens of millions of dollars in damages.

16 THE COURT: Well, they weren't able to sell the
17 Gawker website because it was toxic.

18 MR. CLARK: That's interesting, Your Honor. As I
19 look at the record of the auction and what happened, you had
20 your stalking horse bidder -- I think it was Ziff Davis --
21 coming in at whatever the number was, \$80 or \$90 million --
22 and then Mr. Galardi conducted an auction at which Univision
23 also showed up. And there was -- they were in the fortunate
24 situation of having at least a two-horse race and back-and-
25 forth bids, and eventually it got up to \$135 million and

1 Univision was the winner.

2 At that time, the agreement provided that
3 Univision had effectively a put option on the gawker.com
4 assets. It didn't have to take them if it didn't want to.
5 And I don't know, a couple of weeks after Your Honor
6 approved -- confirmed the plan and approved the sale, they
7 elected not to take the gawker.com assets, and let those
8 with the estate. The purchase price didn't come down, so
9 that's not a detriment to the estate. To the extent those
10 assets have any value at all, it was a benefit, so there's
11 no damage from that.

12 The only damage they say comes out of the Bollea
13 lawsuit. He talks about that they're going to look for
14 prima facie torts by -- he's suggestive that they're going
15 to look at prima facie torts allegedly by Mr. Thiel in
16 connection with others, besides Mr. Bollea, who might have
17 had claims against Gawker. But the only claimants that have
18 incited to, in these proceedings that resulted in any loss
19 are, as I say, Mr. Bollea. And then I guess you could look
20 at Ayyadurai and Terrill, who, between them, got settlements
21 of a little bit over a million dollars.

22 But all of those settlements were presented by
23 Gawker to this Court for approval, and the Gawker folks
24 argued that those settlements were fair and reasonable, and
25 this Court so found in confirming the plan. So those are

1 not special damages that could be laid at Mr. Thiel's
2 doorstep under any analysis.

3 And as to the other theoretical claimants? They
4 haven't brought any claims against Gawker. They haven't
5 caused any loss to Gawker, and given its post-confirmation
6 state, they never will. So there's no possibility of a
7 prima facie tort theory, Your Honor, at all.

8 Now on the issue that you focused on, Judge, on
9 malice. What that element of prima facie tort under New
10 York law says is that the intentional act inflicting harm
11 has to be -- it's not just solely by malice. There are
12 actually two elements to this: it's got to be an act that is
13 without excuse or justification, that's one; and then
14 motivated solely by malice. And the first element of that,
15 that's still in play in here.

16 With respect to Bollea, that element can't be
17 satisfied because the Court in Florida found that Gawker
18 acted maliciously, tortuously, and it was subject to
19 punitive damages. And Gawker in settling out those claims
20 effectively agreed to allow that judgment to become final
21 and of record. So you can't deny that there was
22 justification and excuse for bringing a claim against Gawker
23 that was successful.

24 And then you go to the second part of that; was
25 that motivated solely by malice? Well, the papers that they

1 submitted to Your Honor show that that is not the case.

2 First of all, the articles that they cite to show -- cite
3 specifically to Mr. Thiel's acknowledgement in public that
4 he had an economic motive here, a sharing in whatever the
5 recovery to Mr. Bollea would be.

6 THE COURT: You know, it sounds like you're
7 arguing a motion for summary judgment.

8 MR. CLARK: I'm just pointing out what the record
9 is in front of Your Honor.

10 THE COURT: I understand, but the focus of the
11 Rule 2004 exam is to develop the facts to support the
12 claims. And the fact that he can't support the claims now
13 doesn't mean that I should deny the 2004 application.

14 MR. CLARK: But it's a proportionality issue, Your
15 Honor. In order for them to justify the kind of probing,
16 expensive, time-consuming examination they're looking for
17 here, they got to show that there is some, as I just said,
18 that there's some fish.

19 THE COURT: So what do you think the appropriate
20 area of inquiry would be that Mr. Thiel should submit to?

21 MR. CLARK: If the Court --

22 THE COURT: What's the proportional area of
23 inquiry?

24 MR. CLARK: There shouldn't be any. But if the
25 Court sees --

1 THE COURT: That's not proportionality; that's
2 just he hasn't shown cause at all.

3 MR. CLARK: But if Your Honor thinks there should
4 be some, I would suggest the inquiry should be -- at least
5 initially and then we can come back to Your Honor if we have
6 to -- an interrogatory -- one: Mr. Thiel, please identify
7 each and every person whose litigations claims, or potential
8 claims, against Gawker you agreed to fund and support.

9 THE COURT: You know, the problem with
10 interrogatories are they're questions written by lawyers and
11 answered by lawyers. So why not just get the copies of the
12 agreements or, you know, the underlying documents.

13 MR. CLARK: Unless, that's the other point, Your
14 Honor. You mentioned this to Mr. Galardi. Look at the
15 agreements; what do they say? Those settle -- and we are
16 clearly a third-party beneficiary to those agreements -- but
17 what does it say. All three of them, I'm going to put some
18 ellipses in here, but I'll just quote. All three of them
19 say the same thing: The debtors shall not seek from any
20 third party any discovery about Bollea or Ayyadurai or
21 Terrill, including without limitation, discovery concerning
22 the subject matter of the 2004 motion.

23 THE COURT: And what's the exception for Ayyadurai
24 and Terrill?

25 MR. CLARK: They can get from Ayyadurai and

1 Terrill any non-privileged, as I recollect it, non-
2 privileged retention agreements with their lawyers or
3 funding agreements with third parties.

4 THE COURT: Okay.

5 MR. CLARK: They can get that. They don't need
6 anything from Mr. Thiel on that.

7 THE COURT: Unless he has copies of it.

8 MR. CLARK: If he's already got it.

9 THE COURT: You're saying that the discovery is
10 limited only to asking Ayyadurai and Terrill?

11 MR. CLARK: Under the Ayyadurai and Terrill
12 agreements, that's right. It says that they can ask for
13 those documents from either -- let me --

14 THE COURT: I don't think that's the concern.

15 CLERK: I had -- Your Honor was asking about that
16 and I remembered it from Mr. Galardi's reply, so I went to
17 his reply. It says, the quote from the Ayyadurai and
18 Terrill settlement agreements is on Page 12 and 13 of the
19 reply, Your Honor.

20 THE COURT: Go ahead.

21 MR. CLARK: And going over from 12 to 13, it
22 says: The Gawker entities shall not seek from the two of
23 them or any third party -- skipping down -- discovery
24 concerning the subject matter of the 2004 motion, which
25 eliminates all of this.

1 THE COURT: Subject to?

2 MR. CLARK: The exception at the top of Page 13:
3 Except for the following discovery to Ayyadurai and Terrill,
4 any litigation financing agreements and any non-privileged
5 retainer agreements. So that allows him to go to those two,
6 but it doesn't allow him to go to Mr. Thiel for that.

7 THE COURT: Do you agree with that interpretation?

8 MR. GALARDI: Your Honor, I actually don't agree,
9 and I understand that that's the brief. But, again, with
10 respect to Mr. Thiel, Mr. Clark is ignoring the very big
11 section that says, the 2004 can go forward, suspend
12 prosecution. In the event that the suspension period
13 expires and the Gawker debtors pursue the 2004 with respect
14 to Bollea, we will not seek Bollea or the discovery with
15 respect to the Bollea agreement. And with respect to
16 Ayyadurai and Terrill, we can seek those documents. The
17 agreements, I actually agree -- I'm sorry. We seek those
18 agreements from Ayyadurai and Terrill, but not from Mr.
19 Bollea.

20 THE COURT: Okay. So you could -- putting either
21 issues aside, you could ask for that information from
22 Ayyadurai and Terrill, but you can't ask Harder, for
23 example, for a copy of an agreement that might exist between
24 Thiel and Ayyadurai or Terrill.

25 MR. GALARDI: Correct.

1 THE COURT: Okay.

2 MR. CLARK: Right. So he'd get those documents
3 from the two of them; they've agreed to that. But he has
4 agreed, in both those two settlement agreements and the
5 Gawker when Mr. Galardi started to quote from Bollea.

6 THE COURT: If you eliminate Bollea, Ayyadurai,
7 and Terrill, you could ask Mr. Thiel for any other
8 settlement -- any other litigation finance agreements,
9 right?

10 MR. CLARK: I could give you an answer to that
11 right now. There aren't any. So it's a waste of time to go
12 through it, Your Honor. He can have his discovery from the
13 two people who he settled with and who agreed to give him
14 documents -- very limited documents. But he's made a
15 promise and he's gotten the benefit of the pro -- look, what
16 they got from Mr. Tabak's client in that agreement was a
17 reduction of liabilities by roughly \$100 million -- so they
18 go the benefit of that bargain. And Mr. Bollea and Mr.
19 Thiel, a third-party beneficiary of this agreement, they're
20 entitled to the benefit of the bargain as well. It says,
21 they shall not seek discovery concerning the subject matter
22 of a 2004 motion from any third party. Mr. Thiel is a third
23 party. They should be held to their promise.

24 If the Court has any other questions, I'd be happy
25 to address them.

1 THE COURT: I don't.

2 MR. CLARK: I did have a great speech about the
3 First Amendment and the right to privacy, Your Honor, but
4 I'm not going to take up your time.

5 THE COURT: All right. Why don't you wait around
6 and we'll listen to it at the end.

7 MR. CLARK: We'll do it at lunch or maybe I'll
8 give it to you this afternoon.

9 THE COURT: I look forward to it.

10 MR. CLARK: Thank you.

11 MR. KOHN: Good morning, Your Honor. For the
12 record, Samuel Kohn of Chadbourne & Parke, on behalf of
13 Harder Mirell & Abrams and Charles J. Harder, the Harder
14 Firm. Mr. Harder is in the Courtroom here today. Mr. Clark
15 talked about proportionality and Your Honor said, well,
16 proportionality means what discovery do they want and what
17 discovery should I allow. First of all, this is a discovery
18 targeted at lawyers. And, you know, under the --

19 THE COURT: I was deposed when I was a lawyer. It
20 wasn't pleasant, but --

21 MR. KOHN: But under the Dennis Friedman standard,
22 there is, the Second Circuit did tell us what the standards
23 are. And two items are very -- two elements are very, very
24 relevant of Dennis Friedman: number one, the need to depose
25 a lawyer; and number two, the disruption of the attorney-

1 client privilege.

2 THE COURT: Could he depose Mr. Harder, though,
3 about his communications with Mr. Thiel? He didn't
4 represent Mr. Thiel I take it.

5 MR. KOHN: Well, why would he need to depose Mr.
6 Clark?

7 THE COURT: Well, don't answer a question with a
8 question. We don't do that.

9 MR. KOHN: No, under the Dennis Friedman standard,
10 I would say no.

11 THE COURT: Why not?

12 MR. KOHN: Because he could depose Mr. Thiel.

13 THE COURT: But he's not Mr. Thiel's lawyer; he's
14 a fact witness.

15 MR. KOHN: He doesn't have to. He has to -- well,
16 in order to get the claim against Mr. Thiel -- I'm not
17 suggesting that he does that.

18 THE COURT: I understand we're speaking
19 hypothetically.

20 MR. KOHN: But though we're speaking
21 hypothetically because he could depose Mr. Thiel about
22 communications with Mr. Harder; therefore, he doesn't need,
23 under the Dennis Friedman standard, to depose. He can't
24 depose.

25 THE COURT: So even though he's a fact witness and

1 not Mr. Thiel's lawyer, he can't ask -- Gawker can't ask Mr.
2 Harder about communications with (indiscernible).

3 MR. KOHN: Because you can get that information
4 from other sources.

5 THE COURT: I understand you're saying that, but
6 that's true of everything.

7 MR. KOHN: Well, something Your Honor --

8 THE COURT: So you're saying that because he's a
9 lawyer --

10 MR. KOHN: Yes.

11 THE COURT: -- even though he wasn't functioning
12 as a lawyer for Mr. Thiel --

13 MR. KOHN: Yes.

14 THE COURT: -- he gets protection?

15 MR. KOHN: Yeah. Otherwise, what does that first
16 element mean? It means you depose the lawyer. What does
17 that element mean?

18 THE COURT: But that's in connection with matters
19 relating to the representation.

20 MR. KOHN: No, no, no, there's a separate element.
21 Those are four separate elements under Dennis Friedman.
22 There's four separate elements: the need to depose the
23 lawyer; the role in connection with the matter on which
24 discovery is sought and in relation to the pending
25 litigation; the risk of accounting privilege; and to the

1 extent of discovery already conducted. Those are four
2 distinct elements under the 2nd Circuit precedent.

3 The need to depose the lawyer means that if you
4 can get the information from somebody else -- you don't go
5 to Shelton, you don't go back to the Eighth Circuit case in
6 Shelton, but it's an element to consider, and it's also
7 whether you need to depose the lawyer. So here's another
8 thing. Let's take a look at --

9 THE COURT: Can I ask you a question? If Mr.
10 Harder witnessed an automobile accident and he was a fact
11 witness, would the same rules apply because he's a lawyer
12 and you can get the information from somebody else, you
13 can't ask him any questions?

14 MR. KOHN: Well, no, because he was involved.

15 THE COURT: Well, he's in involved in this also.

16 MR. KOHN: Well, not really, not really. He's not
17 involved in the issue. But, Your Honor, let me just talk
18 about -- a little bit about the breadth of the discovery
19 that they want.

20 THE COURT: First about discovery you think is
21 appropriate first.

22 MR. KOHN: I would suggest none against Mr.
23 Harder.

24 THE COURT: All right. So what, you're going to
25 tell me that it's too broad?

1 MR. KOHN: But, wait -- an interrogatory, an
2 interrogatory of what financing agreements are there, other
3 than Bollea. And I can tell you that there aren't any. But
4 let's take a look at the appendix that they attached. First
5 of all, this is on Page 33 of 49 of Document 341, which was
6 not amended by this motion.

7 THE COURT: Well, it will have -- maybe it has to
8 be amended because two of the three rationale.

9 MR. KOHN: First of all, there's no limitation in
10 time, that's number one. No limited time on the request at
11 all.

12 THE COURT: But, you know, if that's your argument
13 --

14 MR. KOHN: Well, wait a minute, no.

15 THE COURT: Let me just finish.

16 MR. KOHN: Yeah.

17 THE COURT: If you're telling me that it's
18 disproportionate and there is some discovery that may be
19 appropriate, normally, I'd say meet and confer, and if you
20 can't agree, come back and I'd resolve it. But that's not
21 what you're arguing. You're arguing that no discovery is
22 appropriate.

23 MR. KOHN: Right. I'm arguing because the
24 information, the first item says litigation agreements --
25 you can get litigation agreements from other than the

1 lawyer; finance agreements -- you can get information other
2 than the lawyer; agreements with Thiel, consents,
3 consultations regarding litigation -- that could be
4 privileged; strategies -- privileged; solicitation --
5 privileged.

6 THE COURT: So he asserts privilege.

7 MR. KOHN: Retainer agreements --

8 THE COURT: Wait, wait. He's asking for
9 documents.

10 MR. KOHN: Right.

11 THE COURT: If the documents are privileged, you
12 file a privilege log, and then I look at the documents if
13 they can't be resolved and I decide that.

14 MR. KOHN: Right, I know, Your Honor. But let's
15 take a perspective here. The Harder Firm is not Sun Edison.
16 There's 12 people, four staff.

17 THE COURT: Thank goodness.

18 MR. KOHN: Okay, there are 12 lawyers and there
19 are four staff members.

20 THE COURT: Okay. Have you asserted that it is a
21 burden? That's something that gets worked out in the meet
22 and confer.

23 MR. KOHN: It goes to the 2004, because if it's
24 burdensome to the party that's being examined, that's part
25 of the 2004 analysis.

1 THE COURT: Where is the affidavit in the record
2 which talks about the burden?

3 MR. KOHN: You could submit it? We could submit -
4 -

5 THE COURT: If it's burdensome, normally the party
6 that's being asked to produce the discovery has the burden
7 of showing that it's burdensome.

8 MR. KOHN: Let me just say one thing, Your Honor.

9 THE COURT: I mean, Mr. Clark has told me there's
10 no burden. All he has to say is there are no such
11 agreements. That doesn't sound very burdensome.

12 MR. KOHN: Let me -- the Harder firm, Mr. Harder
13 and the Harder firm were released. This is just like an end
14 run to get back at the firm. That's all Gawker is doing.
15 And they're also trying to drag other people that filed
16 claims or filed cease and desist letters or do anything
17 against Gawker, to get back at them. These people want to
18 get back on their lives. These are peoples' lives were
19 ruined by Gawker. They want to get back.

20 What's going to happen if Your Honor is going to
21 order the 2004 discovery, it's like the rape victim being
22 raped again by Gawker, because they're going to be dragged
23 into the public arena again because one of these documents
24 is going to refer to other clients. They want documents
25 from other clients -- not Bollea, not Ayyadurai, not Terrill

1 -- but other clients that were victimized by Gawker. And
2 then you have press reporters out here. Are they going to
3 say, Court allows Harder Firm to divulge secrets of clients.
4 That's what going to happen, because I'm in the case a week
5 and I'm getting emails.

6 THE COURT: But that's not the case. He's not
7 going to have to divulge any secret. Let me just finish.
8 What you're saying is because there's a possibility that
9 Gawker may ask for otherwise confidential or secret
10 information or privileged information, there should be no
11 2004 discovery. But we have ways to deal with that. You
12 object on grounds of privilege, assuming a work-product
13 privilege or attorney-client privilege. You file a
14 privilege lot. I look at the documents if it's necessary,
15 and I make a decision. That's the way we deal with these
16 issues.

17 MR. KOHN: Except for one thing. There are 10 --
18 there's thousands and thousands -- here, let me just read
19 one thing that he says. Without limitation to Thiel,
20 without limitation to the debtors, retainer or such other
21 agreements between Harder clients and Harder, the Harder
22 firm. That's every single retainer.

23 THE COURT: Then that may be too broad and they
24 may not be entitled to that.

25 MR. KOHN: Right. So where do you -- so here's

1 another thing. Solicitations, by the Harder firm of
2 potential clients.

3 THE COURT: Let me stop you. If you're arguing
4 that they have not shown cause for the 2004 exam, that's
5 fine, I'll hear the argument. If you're saying that the
6 request is too broad, I'll say meet and confer, and then
7 come back to me with any disputes. So don't tell me that,
8 you know, they're asking for a lot of stuff they're not
9 entitled to. That's not unusual, that's what a meet and
10 confer is for, assuming they are otherwise entitled to
11 discovery.

12 MR. KOHN: So, okay, fair enough. So they haven't
13 shown good cause because the claim that's left is this
14 malicious tort claim. Now the only damage that could
15 possibly have asserted -- the only damages that they can get
16 is the Bollea, the Bollea litigation, the causes of the
17 Bollea litigation. There's nothing else that damaged, that
18 they're damaged about. So you're talking about malicious
19 tort, where is the damage?

20 THE COURT: But that's what the purpose is.

21 MR. KOHN: Where's the fish?

22 THE COURT: That's the purpose of the discovery in
23 a 2004 context. Putting aside whether it's appropriate in
24 this context or not, debtors take 2004 discovery to discover
25 claims. They don't have to prove their claims in order to

1 get the discovery they need to prove their claims.

2 MR. KOHN: Yeah, but we know what the damages are
3 now. We know what the damage is. We don't have to take
4 discovery to know what the damages are, do we? We know that
5 Gawker was damaged and was only damaged by the Bollea
6 lawsuit, and all documents related to the Bollea lawsuit are
7 off limits and the modus of Bollea are off limits because
8 that's the only damage that there is. That's a record; that
9 is something that Your Honor could take judicial notice of.
10 What is the damage; where is the damage that they are trying
11 to assert?

12 THE COURT: Okay, but normally, they would file a
13 Complaint and you make a motion to dismiss because they
14 failed to allege special damages.

15 MR. KOHN: But if you know this in the beginning,
16 why are you allowing 2004?

17 THE COURT: So I have to decide a motion to
18 dismiss in order to decide the 2004.

19 MR. KOHN: No, no. You can now find, as a matter
20 of law, there is no claim because of the judicial notice.

21 THE COURT: I can't decide there's no claim
22 without a Complaint in front of me. Okay, why don't you
23 wrap it up? I have a (indiscernible).

24 MR. KOHN: Okay. So, anyway, I was just talking
25 about why, based on Friedman's standards, if you're talking

1 about lawyers, there should be -- and I really didn't get
2 into what's going to happen to the Harder Firm.

3 What the reputation to the Harder Firm is going to
4 be, because people will then see that the Harder Firm's
5 records are out there in the public at Gawker again. And
6 then Gawker, who knows, is going to publicize these records.
7 Again, that is a privacy issue that Your Honor should take
8 into consideration for going against Harder, because that's
9 what Gawker did previously and now they're going to do it
10 again. And they're going to take these records; what are
11 they going to do with these? How do we know that these
12 documents that are going to be sent to Gawker that Gawker is
13 not going to make a big fuss about.

14 THE COURT: So you want me to impose a gag rule.

15 MR. KOHN: Either that, yeah, yeah, please, do
16 that or not approve the 2004 because of the proportion --
17 not because of the -- because of the privacy issues, and
18 these people are being dragged again into the public arena.

19 THE COURT: I don't understand the privacy issues.

20 MR. KOHN: Can I tell you, Your Honor? I'll tell
21 you. Because the Gawker was a monster. It ruined peoples'
22 lives. That's what they did for a living. These are people
23 --

24 THE COURT: But it's not operating anymore.

25 MR. KOHN: The victims are petrified. Yes, but

1 there are editors that look at these documents and say, to
2 their friend down the street, go ahead and publish it. And
3 then all of a sudden, it will get into the public record
4 again. So these people that were victimized by Gawker in
5 the first instance, any records that Harder may produce,
6 privileged or not privileged, will be (indiscernible).

7 THE COURT: So you're saying that if Harder has
8 non-privileged records which support a viable claim, they
9 shouldn't be produced because they might get out in the
10 public?

11 MR. KOHN: Well, first of all, I'm saying there's
12 no viable claim, that's number one. There's no viable claim
13 in this matter because it's impossible to be a viable claim
14 because there is no damages with Bollea.

15 THE COURT: Wrap it up, please.

16 MR. KOHN: Okay. So, anyway, if you're getting to
17 -- Gawker talks about the fact that, you know, that some of
18 our cases talk about depositions in that documents in terms
19 of lawyers, but they fail to recognize on the side of
20 patsies, which also talked about documents including
21 depositions. And also, the disruption of the privilege is
22 going to be very important and a disruption to the debtors,
23 to the Harder Firm, because of what they're going to do.

24 So, you know, Mr. Hardee was released. He was
25 released from everything, and he was released personally and

1 he was released from the law firm. And this -- for the
2 smoking gun document that he's looking for, he could get
3 from Mr. Thiel. And if he doesn't --

4 THE COURT: But that's not what Mr. Thiel's
5 attorney says.

6 MR. KOHN: And if he can't get it from Mr. Thiel
7 and he won't get it from Mr. Thiel because I know he won't
8 get it from Mr. Thiel, then the 2004 is not appropriate.
9 Thank you.

10 THE COURT: Thank you.

11 MR. GALARDI: Just very briefly, Your Honor.

12 THE COURT: Very briefly.

13 MR. GALARDI: First, the standard is not a motion
14 to dismiss or summary judgment. Your Honor has pointed that
15 out. The second, as I pointed out before, the 2004 request,
16 we admit, needs to be proportional in this sense. So, for
17 example, as I've often before, I don't need to go forward
18 with depositions until we find a document. I'm more than
19 willing to talk about that, more than willing to build in
20 all of the settlements and have Mr. Tabak involved. So
21 that's important.

22 Next, it's not a fishing expedition where you're
23 fishing beyond a cause of action. We've been very
24 particular about the cause of action.

25 And, third, I think we're hearing things that are

1 a little bit too cute and I want to point it out. Mr. Clark
2 says burdensome defense, says there's no documents, there's
3 no other litigation agreements. But -- and then Mr. Harder
4 says it's going to be very burdensome because they've got to
5 go through all these agreements. I'm just to posit that
6 what we believe has gone on and from Mr. Wong and from
7 others that we have spoken with, there was an agreement
8 between Mr. Thiel and Mr. Harder where Mr. Thiel said, I'll
9 fund litigations. I don't need to know the particular
10 plaintiff, so there may not be a Wong-Thiel agreement, a
11 Wong-other person agreement. That's the kind of agreement
12 that we think we should be able to get, and that's not a
13 client privileged document.

14 So those are the kinds of documents that we think
15 we should -- can get with very proportional discovery, very
16 pointed discovery. Happy to work with Mr. Clark, worked
17 with him for many years.

18 THE COURT: Mr. Clark's going to -- you're all
19 going to set a stop to this.

20 MR. CLARK: As I did say, Your Honor, there are no
21 such documents. And the only point I would make is that if
22 Mr. Galardi can take this discovery --

23 MR. GALARDI: Submit an affidavit from him that
24 there are no such documents?

25 MR. CLARK: We could give you an affidavit. We

1 could do that.

2 MR. GALARDI: You have no such financing
3 documents, let's -- let me talk to Mr. Clark.

4 THE COURT: Okay.

5 MR. GALARDI: I'd like to meet and confer about
6 this. We're not trying to overdo the discovery.

7 MR. CLARK: But, Your Honor, the one other point I
8 would make, and that is -- and I asked this question before
9 -- to what end? He gets this discovery, he gets to ask this
10 question.

11 THE COURT: You're saying there's no discovery.

12 MR. CLARK: No, my point is that he asks for these
13 things in connection with what? In connection with non-
14 Bollea people who might have had some discussion about a
15 claim against Gawker. But those claims have never been
16 brought, no damages have ever arisen from them; and,
17 therefore, there can be no -- what he's looking for is
18 discovery in aid of an attempt to commit a prima facie tort.

19 THE COURT: I haven't -- I didn't mean to cut Mr.
20 Galardi.

21 MR. CLARK: Yes, and I'm sorry, but I just wanted
22 to get that point in.

23 THE COURT: All right.

24 MR. CLARK: Thank you.

25 MR. GALARDI: Your Honor, and, again, the question

1 is there may be simply one document. There may be a
2 document that says, we'll fund every kind of litigation you
3 have. Go find plaintiffs, go find potential plaintiffs, Mr.
4 Harder, and I'll finance it. It may be a document that
5 says, oh, I looked up Bollea and I'll finance the Bollea
6 litigation. I do not -- I'm not entitled to the second
7 documents. I think we are entitled to the first document,
8 and we'd like to know what kind of documents there are.
9 Thank you.

10 THE COURT: Thank you. I'll reserve decision.

11 MR. GALARDI: Thank you, Your Honor.

12 MR. CLARK: Thank you, Your Honor.

13 MR. KOHN: Thank you, Your Honor.

14 (Whereupon these proceedings were concluded at 10:47
15 AM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya
Ledanski Hyde

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